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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY MILTON IVERSON,

Defendant and Appellant.

C039690

(Super. Ct. No.
99F08271)

A jury convicted defendant Larry Milton Iverson of rape of Deanna C., a developmentally disabled woman who was incapable of giving legal consent because of her disability (Pen. Code, § 261, subd. (a)(1)), two counts of attempted rape (Pen. Code, §§ 664/261, subd. (a)(1)), oral copulation (Pen. Code, § 288a, subd. (g)), sodomy (Pen. Code, § 286, subd. (g)), attempted penetration with a foreign object (Pen. Code, §§ 664/289, subd. (b)), and oral copulation in concert with another (Pen. Code, § 288a, subd. (d)).

Sentenced to an aggregate term of 14 years in prison, defendant appeals, contending that the trial court (1) committed reversible error in refusing to allow cross-examination of Deanna about her alleged sexual abuse by her stepfather and about her flight from that abuse, and (2) failed to adequately instruct the jury. We shall affirm the judgment.

FACTS

At the time of the crimes, Deanna was 21 years old but had a mental disability that left her unable to care for herself. She apparently had left her residence and was reported missing by her mother. Given Deanna's demeanor and appearance, her disability was readily apparent to others.

Deanna met Andrew Lee Drew III at a grocery store. Drew took Deanna behind the store, where he raped and sodomized her. He then took her to a motel across the street.

Drew asked defendant, who was staying at the motel, if he wanted a "date" with Deanna for \$15. The three of them went inside defendant's room, where Drew told Deanna to undress and lie down on the bed. After raping her again, Drew told Deanna to roll over, and defendant sodomized her. Thereafter, defendant had Deanna roll over and orally copulated her, attempted to have sex with her, and fondled her genitals while Drew fondled her breasts. Defendant and Drew then had Deanna orally copulate defendant while Drew sodomized her, and defendant told Deanna to orally copulate Drew. After Deanna was told to shower, the trio smoked rock cocaine.

When Drew and Deanna left the room together, a Sacramento County Sheriff's Deputy saw Deanna and recognized her from her mother's description.

Deanna was examined by a nurse practitioner. Deanna had an abrasion on her labia and a tear at the top of her anal opening, as well as tenderness in her left thigh and right arm. Semen was detected in her vagina, cervix, and anus. Since the nurse believed that Deanna's obvious mental disability made her unable to consent to treatment, two doctors approved further medical treatment on her behalf.

Defendant admitted having sexual intercourse with Deanna, as well as fondling her genitals. Defendant acknowledged that he knew Deanna was "slow," estimating her mental capacity as that of a 14 year old. He claimed that Deanna consented to the sexual acts, refusing once when Drew told Deanna to orally copulate defendant.

DISCUSSION

I

In a separate trial, Deanna's stepfather was facing multiple charges of having committed various sexual offenses against Deanna and her sister.

Codefendant Drew and defendant sought to admit the fact that Deanna had been sexually abused by her stepfather for months and had run away from home to escape the abuse. They argued that her "escape" demonstrated her ability to consent to sexual activity and that Deanna would have run from "uncomfortable sexual conduct" with Drew and defendant. The court excluded the evidence. Drew

was convicted, but the jury deadlocked on defendant and a mistrial was granted as to him.

On retrial, the prosecution moved in limine to exclude any evidence that Deanna had been sexually and physically abused by her stepfather for years. Again, defendant sought to introduce this evidence to demonstrate that Deanna had the mental capacity to refuse consent to sexual acts.

In the various interviews of Deanna, she never indicated whether she had resisted or otherwise refused to consent to the sexual abuse by her stepfather. Thus, the parties agreed that the prosecutor could ask Deanna privately whether "she ever said no or attempted to resist the stepdad" and "whether the problems that Deanna said she was having at home related to this sexual abuse and that's why she was fleeing the home." Defense counsel stipulated that he would accept the prosecutor's representation as to Deanna's response.

After speaking with her, the prosecutor reported that Deanna said (1) the reason she left home was her stepfather asked her to remove some clothes, but (2) made no indication that she ever verbally or otherwise put up any resistance to his sexual abuse of her. The court asked whether defense counsel had "[a]nything further on that issue?" Counsel responded, "No, Judge. [¶] I -- as I previously stated I would accept [the prosecutor's] representation."

The court then granted the prosecutor's motion to exclude the proffered evidence that Deanna had been sexually molested by her stepfather.

Defendant contends "[t]he trial court's refusal to permit defense cross-examination of [Deanna regarding her] stepfather's sexual abuse and her flight from home constituted reversible error" because it deprived defendant of his "rights to confrontation, cross-examination, and [to] present a defense [as] guaranteed by the Sixth and Fourteenth Amendments" to the federal Constitution. We disagree.

"The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' . . . Confrontation means more than being allowed to confront the witness physically. . . . [A] primary interest secured by it is the right of cross-examination.' [Citation.]" (*Davis v. Alaska* (1974) 415 U.S. 308, 315 [39 L.Ed.2d 347, 353].)

However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679 [89 L.Ed.2d 674, 683].) "In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623), which authorizes the court to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue

prejudice, of confusing the issues, or of misleading the jury.”

(Evid. Code, § 352; further section references are to the Evidence Code unless otherwise specified.)

When the relevance of proffered testimony depends upon the existence of a preliminary fact (§§ 401, 403, subd. (a)(1)), and the existence of that fact is disputed (§ 402), the proponent of the testimony has the burden of producing evidence sufficient to convince the court “as to the existence of the preliminary fact” (§ 403, subd. (a)). Otherwise, the proffered evidence is inadmissible. (§ 403, subd. (a).)

Here, the relevance of the proposed cross-examination of Deanna depended upon the existence of preliminary facts, i.e., that Deanna had resisted her stepfather’s sexual abuse of her and that she had fled from the home to escape his sexual abuse. These facts were not undisputed. Indeed, before Deanna testified, defendant’s trial counsel accepted the prosecutor’s representation that Deanna (1) had made no indication that she ever resisted the sexual abuse and (2) had said that she left the home because her stepfather asked her to remove some clothes, a statement which does not necessarily mean that she fled because he was abusing her sexually.

Because defendant’s counsel did not carry his burden of producing evidence sufficient to convince the trial court that Deanna had in fact resisted the sexual abuse by her stepfather and had in fact fled the home to escape that abuse, the trial court did not abuse its discretion in excluding the proffered cross-examination. (§§ 401, 402, 403.)

Defendant disagrees, claiming that "[e]ven assuming . . . Deanna [would have] testified directly that she did not resist or attempt to resist [her stepfather], a reasonable juror would have inferred circumstantially from the undisputed acts of sexual abuse and flight that her running away was a circumstantial form of resistance to sexual abuse. Restated, she resisted sexual abuse not directly with her mouth, but circumstantially with her feet." Not so.

The record reflects that Deanna's stepfather physically and sexually abused her and her sister in their various homes over the course of several years. There is no evidence that Deanna resisted the abuse when it occurred or left the home while her stepfather was there either assaulting her or her sister. Under the circumstances, the fact that Deanna ultimately left her abusive home does not lead to a reasonable inference that she had the legal capacity to consent to the sexual molestation by her stepfather and did so, thus leading to the inference that she had the capacity to resist, but instead consented to, the sex acts perpetrated against her by defendant and Drew.

In any event, prior to granting the prosecutor's motion to exclude the proffered cross-examination, the trial court repeatedly commented on its discretion to prohibit it pursuant to section 352. Because an attempt to draw the inference sought by defendant would have required, at a minimum, the introduction of time-consuming evidence about the number and nature of the stepfather's sexual assaults against Deanna and her reactions to each, it cannot be said that the court acted arbitrarily, capricious, and beyond the

bounds of reason in excluding the evidence pursuant to section 352. (*People v. Welch* (1993) 5 Cal.4th 228, 234.)

The court's exercise of discretion to exclude the proffered cross-examination did not violate defendant's constitutional right to confront witnesses (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 679 [89 L.Ed.2d at p. 683]) or his right to due process of law (*People v. Babbitt* (1988) 45 Cal.3d 660, 684-685).

II

The statutory definitions of sex crimes against a person who is incapable of giving legal consent because of a developmental disability require that, to convict the defendant, the jury must find that the victim's inability to give legal consent due to the developmental disability must have been "known or reasonably should [have been] known to [the defendant]." (Pen. Code, §§ 261, subd. (a)(1), 286, subd. (g), 288a, subd. (g), 289, subd. (b).) The jury was so instructed.

"The language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language." (*People v. Poggi* (1998) 45 Cal.3d 306, 327.)

Nevertheless, in his supplemental opening brief, defendant claims that the trial court erred in failing to instruct sua sponte on the definition of criminal negligence. According to defendant, the failure to so instruct allowed the jury to convict him using

an ordinary civil negligence standard, rather than a criminal negligence standard. The contention fails.

As the People point out, the California Supreme Court long ago rejected a similar claim regarding the murder special circumstance that an accused "knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties" (Pen. Code, § 190.2, subd. (a)(7).) In *People v. Rodriguez* (1986) 42 Cal.3d 730, the Supreme Court found no error in the trial court's failure to instruct sua sponte on the meaning of "'reasonably should have known.'" (*Id.* at p. 782.) In the court's words: "First, any instruction elaborating on the term 'reasonable' would add little, if anything, to the understanding of most jurors. Moreover, the average juror has the ability to cull from everyday experience a standard by which to assess the ability of a defendant to know the status of his or her victim." (*Ibid.*, fn. omitted.) The court went on to point out that "[s]uch an instruction could do little more than inform the jury that "'reasonable" means "what an average person of average intelligence would have known under the circumstances."'" (*Id.* at p. 782, fn. 19.)

The Supreme Court's reasoning is persuasive with respect to the instructions in this case that, to convict defendant of sex crimes against Deanna, the jury must find that her inability to give legal consent due to her developmental disability "was known or reasonably should have been known to [defendant]." Because a jury would have no trouble understanding this instruction, the trial court had no duty to instruct sua sponte with a definition of the statutory phrase.

III

Although not raised by the parties, we have found an error in the abstract of judgment. Defendant was charged in count 13 with violating Penal Code section 288a, subdivision (d), and he was convicted of that charge. But the abstract of judgment erroneously reflects the imposition of sentence under Penal Code section 288, subdivision (a)(1). We shall direct the trial court to correct this error.

DISPOSITION

The judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect that defendant's conviction in count 13 is for violating Penal Code section 288a, subdivision (d). The court is further directed to forward a certified copy of the amended abstract to the Department of Corrections.

_____, SCOTLAND, P.J.

We concur:

_____, DAVIS, J.

_____, ROBIE, J.